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By Joseph F. Smith, Jr.*

An Analysis of When Juveniles Must Be Afforded Due Process Rights

I. INTRODUCTION

In a series of notable cases, the United States Supreme Court has undertaken the process of defining the procedural due process rights of juvenile offenders. Although the Court has heretofore decided that a number of specific rights attach in a juvenile proceeding, there exists no clear indication of the criteria necessary to determine when these rights attach. A reading of the leading Supreme Court cases, as well as state court decisions applying those cases, makes it abundantly clear that when a juvenile faces the possibility of incarceration for having committed an act which would constitute a crime if committed by an adult, certain constitutional rights must be afforded the juvenile during the adjudicatory process.¹ However, juvenile court statutes providing special courts for juvenile offenders do not limit the jurisdiction of these courts to acts which would constitute violations of the states' criminal codes. Instead, the usual statute provides that juveniles may also be brought before the juvenile court for having committed such noncriminal acts as truancy, running away, and ungovernable behavior. Traditionally, both the criminal and noncriminal, or status offenses, are included in the definition of delinquency.²

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1. Typically juvenile court proceedings employ a bifurcated trial procedure. The first phase of this procedure is the "adjudicatory hearing," held for the sole purpose of determining the merits of the allegations contained in the petition. If the court determines the allegations are true, the case then enters the second phase or "dispositional hearing." The function of this latter phase is to determine the proper treatment and placement of the child.
2. For a survey of state juvenile statutes and their historical development, see

Recently, there has been a trend to reclassify juvenile offenses. Under this new approach, delinquency is defined as an act committed by a juvenile which would constitute a crime if committed by an adult. This leaves all remaining juvenile offenses to be included in a distinct category typically called "Persons or Children in Need of Supervision" (PINS OR CINS).³ The question which will be examined in this article is whether the constitutional safeguards afforded juvenile offenders facing potential incarceration for having committed acts which would constitute crimes if committed by adults extend as well to status offenders. The importance of this question is demonstrated by the fact that an estimated twenty-three percent of all boys and seventy percent of all girls held in juvenile institutions are guilty of no crime for which an adult would be prosecuted.⁴

II. LEADING SUPREME COURT CASES DEFINING PROCEDURAL DUE PROCESS RIGHTS OF JUVENILES

Before analyzing when procedural due process rights attach in juvenile cases, it is first necessary to outline which specific rights the Supreme Court has afforded juveniles. The leading case defining which fourteenth amendment due process protections the states must afford juvenile defendants is *In re Gault*.⁵ In *Gault*, the United States Supreme Court reviewed an Arizona Supreme Court decision which affirmed the delinquency adjudication of a fifteen year old boy who had been charged with making lewd telephone calls. In the course of this decision, the United States Supreme Court held that in a delinquency adjudicatory proceed-

Comment, "Delinquent Child": A Legal Term Without Meaning, 21 BAYLOR L. REV. 352 (1969); Note, *The Dilemma of the "Uniquely Juvenile" Offender*, 14 WM. & MARY L. REV. 386, 387-89 (1972).

3. See, e.g., CAL. WELF. & INST. CODE § 601 (West 1972 & Supp. 1977); D.C. CODE ANN. § 16-2301(8) (A) (Supp. 1977); MD. CTS. & JUD. PROC. CODE ANN. § 3-801 (1974 & Supp. 1977); N.Y. FAM. CT. ACT § 712 (McKinney 1975 & Supp. 1977). For an examination of the California statute, see Gonion, *Section 601 California Welfare and Institutions Code: A Need for a Change*, 9 SAN DIEGO L. REV. 294. For an examination of the New York statute, see Note, *Ungovernability: The Unjustifiable Jurisdiction*, 83 YALE L.J. 1383 (1974). See generally Stiller & Elder, *PINS—A Concept in Need of Supervision*, 12 AM. CRIM. L. REV. 33 (1974).
4. Siegel, Senna & Libby, *Legal Aspects of the Juvenile Justice Process: An Overview of Current Practices of Law*, 12 NEW ENG. L. REV. 223, 228 n.21 (1976). For detailed statistics concerning the 1973 census of juveniles in public detention and correctional facilities, see LEAA, U.S. DEPT OF JUSTICE, *CHILDREN IN CUSTODY* (Dec., 1977); for the 1975 census, see LEAA, U.S. DEPT OF JUSTICE, *CHILDREN IN CUSTODY* (Oct., 1977).
5. 387 U.S. 1 (1967).

ing, which could result in commitment in a state institution, due process⁶ demands that the child be afforded the following constitutional rights: adequate written notice,⁷ notification of the right to retained or appointed counsel,⁸ the right to confront and cross-examine witnesses,⁹ and the privilege against self-incrimination.¹⁰

Three years after the *Gault* decision, the Supreme Court, in the case of *In re Winship*,¹¹ addressed the issue of what quantum of evidence is necessary to adjudicate a child a delinquent. The precise issue in *Winship* was whether a state may constitutionally adjudicate a twelve year old child a delinquent for allegedly having stolen \$112 and, as a result of that adjudication, confine the child in a state institution, when the prosecutor was only required to prove the alleged facts by a preponderance of evidence.¹² The Court held in *Winship* that when a child is charged as a delinquent for allegedly committing an act which would constitute a crime if committed by an adult, and when such an adjudication could result in confinement in a state institution, guilt must be established by proof beyond a reasonable doubt.¹³

6. We consider only the problems presented to us by this case. These relate to the proceedings by which a determination is made as to whether a juvenile is a "delinquent" as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution. As to these proceedings, there appears to be little current dissent from the proposition that the Due Process Clause has a role to play.

Id. at 13.

7. Due process of law requires notice of the sort we have described—that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding. It does not allow a hearing to be held in which a youth's freedom and his parents' right to his custody are at stake without giving them timely notice, in advance of the hearing of the specific issues that they must meet.

Id. at 33-34.

8. We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.

Id. at 41.

9. "We now hold that, absent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements." *Id.* at 57.

10. "We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults." *Id.* at 55. 397 U.S. 358 (1970).

11. *Id.* at 359-60.

12. Justice Brennan, speaking for the majority in *Winship*, stated: "This case presents the single, narrow question whether proof beyond a reasonable

When analyzing the leading Supreme Court cases developing the procedural due process rights of juveniles, one must note that the Supreme Court chose not to extend to juveniles all constitutional protections which had previously been afforded state criminal defendants through the fourteenth amendment to the Constitution.¹⁴ Rather, the court predicated the decisions in the juvenile cases upon the concept of fundamental fairness. In employing this concept, which was first applied in *Kent v. United States*,¹⁵ the Court has attempted to weigh the effect of granting constitutional safeguards to children against the humanitarian philosophy and informality of the juvenile court system.¹⁶ Using

doubt is among the 'essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which could constitute a crime if committed by an adult." *Id.* at 359 (quoting 387 U.S. at 30). He concluded:

[T]he constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault* We therefore hold . . . "that, where a 12-year-old child is charged with an act of stealing which renders him liable to confinement for as long as six years, then, as a matter of due process . . . the case against him must be proved beyond a reasonable doubt."

Id. at 368 (quoting *In re Winship*, 24 N.Y.2d at 207, 247 N.E.2d at 260 (Fuld, C.J., dissenting)).

14. In considering what constitutional protections must be afforded criminal defendants in state court proceedings, the Supreme Court continues to use a case by case method to analyze which rights of the first eight amendments apply to the states through the due process clause of the fourteenth amendment. *See, e.g.,* *Benton v. Maryland*, 395 U.S. 784 (1969) (guarantee against double jeopardy); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to jury trial); *Washington v. Texas*, 388 U.S. 14 (1967) (right to compulsory process for obtaining witnesses); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (right to a speedy trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confront opposing witnesses); *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege against self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to the assistance of counsel); *Robinson v. California*, 370 U.S. 660 (1962) (prohibition against cruel and unusual punishment); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule made applicable to the states).
15. 383 U.S. 541 (1966). The full implication of the *Kent* decision for the states is not clear since the holding turned upon an interpretation of the D.C. Juvenile Act, as well as the Federal Constitution. *See generally* Comment, *In Re Gault and the Privilege Against Self-Incrimination in the Juvenile Court*, 51 MARQ. L. REV. 68, 72 (1967). For examples of state cases taking the position that the holding in *Kent* was not based on constitutional grounds, see *Powell v. Sheriff*, 85 Nev. 684, 426 P.2d 756 (1969); *Knott v. Langlois*, 102 R.I. 517, 231 A.2d 767 (1967).
16. "We conclude, as we concluded regarding the essential due process safeguards applied in *Gault*, that the observance of the standard of proof beyond a reasonable doubt 'will not compel the States to abandon or displace any of the substantive benefits of the juvenile process.'" 397 U.S. at 367 (quoting 387 U.S. at 21).

this balancing test in *McKeiver v. Pennsylvania*,¹⁷ the Court refused to extend the right of trial by jury to the adjudicatory phase of a delinquency proceeding.¹⁸

In 1975, the Supreme Court again addressed the question of the procedural due process rights of the juvenile offender. *Breed v. Jones*¹⁹ presented the issue of whether jeopardy attached during the adjudicatory phase of a delinquency proceeding in which a seventeen year old was charged with having been involved in an armed robbery and, as a result, faced potential incarceration in a state facility. Speaking for a unanimous Court, Chief Justice Burger held that jeopardy attaches at the adjudicatory phase of a delinquency proceeding when a child is accused of committing an act which would constitute a crime if committed by an adult.²⁰ As a consequence of the *Jones* decision, prosecutors are barred from retrying a child so charged, either as a delinquent or as an adult, once evidence has been offered at a delinquency adjudicatory hearing.²¹

17. 403 U.S. 528 (1971).

18. Justice Blackmun listed 13 separate grounds that were considered in reaching the conclusion that trial by jury in a juvenile court was not an essential element of fundamental fairness. *Id.* at 545-51.

19. 421 U.S. 519 (1975). In *Breed*, a 17 year old was adjudicated a delinquent by the juvenile court under CAL. WELF. & INST. CODE § 602 (West 1966) for allegedly committing an armed robbery. During a subsequent disposition hearing held for the sole purpose of determining the proper treatment and detention for Jones, the state moved that the juvenile court waive jurisdiction and that the defendant be tried as an adult criminal on the ground that Jones would not be "amenable to the care, treatment and training program available through the facilities of the juvenile court." CAL. WELF. & INST. CODE § 707 (West Supp. 1967). (Almost all states have similar procedures by which a juvenile court may, under certain circumstances, waive its jurisdiction over an alleged delinquent, and the child may then be tried as an adult criminal.) Despite Jones' claim that jeopardy attached at the adjudicatory hearing in which he was found to be a delinquent, the juvenile court waived its jurisdiction, and Jones was subsequently tried and convicted of armed robbery as an adult. After his conviction, Jones sought and was denied federal habeas corpus in the United States District Court for the Central District of California. 343 F. Supp. 690, 692 (1972). The Ninth Circuit Court of Appeals reversed, 497 F.2d 1160, 1165 (1974), and the Supreme Court affirmed, holding that the procedure violated the principles of double jeopardy. 421 U.S. at 541.

20. "We therefore conclude that respondent was put in jeopardy at the adjudicatory hearing. Jeopardy attached when respondent was 'put to trial before the trier of the facts,' . . . that is, when the Juvenile Court, as the trier of facts, began to hear evidence." 421 U.S. at 531.

21. The United States Supreme Court has recently addressed the issue of double jeopardy in juvenile proceedings. In *Swisher v. Brady*, 98 S. Ct. 2699 (1978), the Court held that Md. Ct. R. 911, which allows state officials to file exceptions to masters' findings in a juvenile proceeding and then obtain review of those findings by a juvenile court judge, does not violate a juvenile's fifth amendment right not to be twice placed in jeopardy.

In all of these cases, a juvenile was charged with having committed an act which would constitute a crime if committed by an adult. In addition, the defendant in each case faced a possibility of incarceration in a state facility. The Court has made it clear that when these two factors are present, states must provide juvenile defendants with the constitutional safeguards granted in *In re Gault*, *In re Winship*, and *Breed v. Jones*.²²

III. REVIEW OF STATE COURT CASES

A problem facing juvenile courts in applying the *Gault*, *Winship*, and *Jones* decisions to a particular case arises from the fact that all the defendants in those cases were charged with acts which would have been criminal if committed by an adult and who, if the acts were proved, faced potential incarceration in a state facility. As a result of these limitations, the juvenile courts confront the question whether the common fact pattern in these decisions establishes a condition precedent to the invocation of procedural constitutional rights in a juvenile proceeding, or whether it merely presents the clearest example of when the rights attach. This problem is underscored by the fact that the Supreme Court, in rendering the *Gault* decision, specifically limited its holding to the facts presented.

We consider only the problems presented to us by this case. These relate to the proceedings by which a determination is made as to whether a juvenile is a "delinquent" as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution.²³

Similar limitations were made in *Winship*,²⁴ in which the Court specifically refused to pass on the "constitutionality of the New York procedures governing children 'in need of supervision.'"²⁵

The uncertainty surrounding these cases can be illustrated by considering three fact patterns which are clearly distinguishable from the *Gault* line of cases. In the first, a juvenile, although charged with an act which does not constitute a crime if committed by an adult, still faces incarceration in a state institution if the charges are proved. In the second, the juvenile is charged with an act which technically constitutes a crime if committed by an adult, but the juvenile does not face potential incarceration. In the third, the acts complained of do not technically constitute a crime if com-

22. State courts have so held. See *Hatcher v. State*, 260 Ark. 903, 545 S.W.2d 632 (1977); *E.V.R. v. State*, 342 So. 2d 93 (Fla. Ct. App. 1977); *In re Henderson*, 199 N.W.2d 111 (Iowa 1972); *In re Spalding*, 273 Md. 690, 332 A.2d 246 (1975).

23. 387 U.S. at 13.

24. See note 13 *supra*.

25. 397 U.S. at 359 n.1.

mitted by an adult, and the juvenile does not face potential incarceration in a state institution.

Several state courts, in applying the *Gault* line of cases, have suggested that both the above criteria must be met.²⁶ These courts have created a two-pronged test to determine when a juvenile will be afforded the protections demanded by the Federal Constitution: A juvenile must be charged with an act which would be criminal if committed by an adult and if proved must face potential incarceration in order for the constitutional protections to attach. It must be noted, however, that in some of these cases the facts presented already complied with the two-pronged test, making it unnecessary to decide whether the constitutional rights would attach if one of the prongs was missing.²⁷

Several courts have dealt with the specific question whether the *Gault* line of cases applies in cases in which a juvenile either is not charged with an act which would be a crime if committed by an adult or does not face potential incarceration. As might be expected, the limited authority has not answered this basic question consistently.

The question has been most frequently presented when state courts have endeavored to determine in exactly which circumstances *Winship* demands proof beyond a reasonable doubt in juvenile proceedings. In *In re Henderson*,²⁸ the Supreme Court of Iowa held that *In re Winship* did not necessitate adjudicating a child delinquent by proof beyond a reasonable doubt when the child's delinquency is predicated upon his being wayward or habitually disobedient because he is uncontrolled by his parents. In upholding the trial court's use of a clear and convincing evidence standard at the adjudicatory hearing, the court expressed the view that *Winship* only applies in cases in which the child is charged with having committed a "public offense," and that the due process standard of fundamental fairness is not offended by using a lesser evidentiary standard when the child is not so charged.²⁹ In later

26. See *Hatcher v. State*, 260 Ark. 903, 545 S.W.2d 632 (1977); *E.V.R. v. State*, 342 So. 2d 93 (Fla. Ct. App. 1977); *In re Henderson*, 199 N.W.2d 111 (Iowa 1972); *In re Spalding*, 273 Md. 690, 332 A.2d 246 (1975).

27. In *Hatcher v. State*, 260 Ark. 903, 545 S.W.2d 632 (1977), *Gault* protections were applied in a case in which a child charged with delinquency for allegedly committing attempted battery faced incarceration in a training school. In *E.V.R. v. State*, 342 So. 2d 93 (Fla. Ct. App. 1977), a delinquency proceeding in which the juvenile was alleged to be a larcenist, the court held the right to counsel conferred in *Gault* encompasses the presentation of a closing statement. See also *District of Columbia v. I.P.*, 335 A.2d 224 (D.C. Ct. App. 1975).

28. 199 N.W.2d 111 (Iowa 1972).

29. *Id.* at 121.

cases, the Supreme Court of Iowa has reaffirmed its position.³⁰

In *In re Walker*,³¹ the Supreme Court of North Carolina concluded that *Winship* does not control the burden of proof when adjudicating a child delinquent for having violated conditions of probation. The court reasoned that under the facts of the case, a violation of probation was not a "criminal" act; therefore, a lesser standard of proof would be sufficient at the adjudicatory hearing.³²

The Court of Appeals of Oregon in *In re K.*³³ determined that *Gault* and *Winship* would not apply unless the juvenile offender faced potential incarceration in a training school, even though the child was charged with having committed an act which would have been a crime if he had been an adult.³⁴

On the other hand, several New York courts have refused to distinguish among types of juvenile proceedings to determine the application of constitutional rights. In a memorandum opinion, the court in *In re William D.*³⁵ held that proof beyond a reasonable doubt is necessary to adjudicate a child a PINS.³⁶ Similarly, in *In re Michael E.*,³⁷ the court refused to afford fewer procedural rights to a child charged with being a PINS for allegedly cursing, and throwing stones and cherry bombs, than to a child alleged to be

30. *In re Wheeler*, 229 N.W.2d 241 (Iowa 1975); *In re Potter*, 237 N.W.2d 461 (Iowa 1976).

31. 282 N.C. 28, 191 S.E.2d 702 (1972).

32. *Id.* at 41, 191 S.E.2d at 711. The juvenile in *Walker* had previously been adjudicated an undisciplined child and placed on probation. Subsequent to that disposition, the juvenile was charged with being a *delinquent* for violating the terms of her probation, pursuant to N.C. GEN. STAT. § 7A-278 (1969), which defines a delinquent as "any child who has committed any criminal offense under State law or under an ordinance of local government, including violations of the motor vehicle laws or a child who has violated the conditions of his probation under this article."

It must also be noted that in another portion of the court's opinion, it held that the juvenile was not entitled to appointed counsel when she was adjudicated an undisciplined child. 282 N.C. at 37, 191 S.E.2d at 708. The reason for this holding was that an undisciplined child does not face the possibility of institutional commitment. Consequently, the *Walker* opinion indicates that both elements of the two-pronged test must be present before procedural due process rights attach.

33. 26 Or. App. 451, 554 P.2d 180 (1976).

34. *Id.* at 457, 554 P.2d at 183. The court held that a juvenile can be found to "knowingly and willingly enter and remain in a dwelling with the intent to commit a crime therein" on an evidentiary standard less than proof beyond a reasonable doubt because under another statute, OR. REV. STAT. § 420.011 (1975), a juvenile of his age could not be committed to a training school. 26 Or. App. at 451, 554 P.2d at 182-83.

35. 36 A.D.2d 970, 321 N.Y.S.2d 510 (1971).

36. *Id.*

37. 68 Misc. 2d 487, 327 N.Y.S.2d 84 (Fam. Ct. 1971).

delinquent.³⁸

State courts faced with the issue of self-incrimination have also analyzed the question of when the *Gault* line of cases must be applied. In *Leach v. Texas*,³⁹ the Texas Court of Civil Appeals determined that a child charged with being a danger to herself is entitled to the fifth amendment protection against self-incrimination.⁴⁰ In reaching its decision, the court applied *Gault* without any reference to whether the child's acts would have been criminal if committed by an adult.⁴¹

The question of when the protection against self-incrimination must be afforded to a juvenile was also explored by Maryland's highest court in *In re Spalding*.⁴² This case is important for a number of reasons. First, both the majority and dissenting opinions in *Spalding* more thoroughly evaluated the problem than did most of the other state courts in the cases discussed. Second, the court considered whether or not the *Gault* line of cases should be applied equally in both CINS and delinquency proceedings.

38. *Id.* at 490, 327 N.Y.S.2d at 87. Under New York law, disorderly conduct is defined thus:

A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:

1. He engages in fighting or in violent, tumultuous or threatening behavior; or
2. He makes unreasonable noise; or
3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or
4. Without lawful authority, he disturbs any lawful assembly or meeting of persons; or
5. He obstructs vehicular or pedestrian traffic; or
6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or
7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose.

Disorderly conduct is a violation.

N.Y. PENAL LAW § 240.20 (McKinney 1975). Therefore, if the requisite intent could be proved, it is possible that this activity would constitute a violation under New York law. See also *In re Renaudo R.*, 73 Misc. 2d 390, 341 N.Y.S.2d 998 (Fam. Ct. 1973).

39. 428 S.W.2d 817 (Tex. Civ. App. 1968).

40. *Id.* at 821.

41. *Leach* involved a 12 year old girl adjudicated delinquent because she habitually deports herself as to injure or endanger the morals or health of herself and other(s) . . . to wit: Runaway on the 25th day of March, 1967, Runaway on the 30th day of June, 1967, Runaway on the 11th day of July, 1967, Runaway on the 26th day of July, 1967.

Id. at 819.

The court of civil appeals reversed and remanded because statements taken from the juvenile in violation of her fifth amendment rights were admitted into evidence. *Id.* at 821.

42. 273 Md. 690, 332 A.2d 246 (1975).

Third, the majority's treatment of the problem clearly demonstrates how over-reliance on the special solicitude supposedly afforded juveniles by juvenile courts can result in a niggardly apportionment of basic constitutional rights, if not an out and out denial of those rights.

In *Spalding* the Maryland Court of Appeals reviewed a prior determination that a thirteen year old was in need of supervision because she "‘deported [her]self as to injure or endanger [her]self and others’ and therefore required ‘guidance, treatment, or rehabilitation.’"⁴³ After an in-depth analysis of the Supreme Court cases, the Maryland Court of Appeals determined that the issues raised by the facts of the *Spalding* case fell outside the purview of the *Kent*, *Winship* and *Gault* holdings.⁴⁴

The initial juvenile proceeding was commenced on February 1, 1973, with the filing of a petition charging Cindy Ann Spalding with being a CINS and a delinquent.⁴⁵ On that same day in juvenile court, she was adjudicated a CINS, and the delinquency charge was apparently dismissed.

The factual allegations of the petition were, in large part, based on a confession elicited from Cindy Ann by the police during questioning on the previous day. Cindy Ann and her mother had both been requested to come to the police station to answer questions about certain activities of Cindy's.⁴⁶ This interrogation produced oral and written admissions by Cindy Ann that she had attended a number of parties at which she had consumed narcotics and engaged in sexual activities with adult men and women. She also admitted that in order to attend these parties she had placed sleep-

43. *Id.* at 698, 332 A.2d at 250.

44. Since *Breed v. Jones*, 421 U.S. 519 (1975), was decided subsequent to the *Spalding* case, its reasoning was not considered by the Maryland Court of Appeals. See notes 19-20 & accompanying text *supra*.

45. 273 Md. at 693-94, 332 A.2d at 248.

46. Initially, this case involved two children, Victoria Elaine Carter, age 11, and Cindy Ann Spalding, age 13. The actual investigation began when the police were called to a hospital to investigate the possibility that Elaine Carter had been raped in addition to having taken an overdose of drugs. At the hospital the investigating officer was informed by the girl's parents that their daughter had taken a white tablet, and that she had also admitted to having had sexual intercourse with an adult male on the previous evening. After a series of medical examinations, the child and her parents went to the Dundalk Police Station for further questioning. At approximately the same time Cindy Ann and her mother arrived at the police station in response to a telephone call from the investigating officer. Elaine Carter, like Cindy Ann, was charged with being a child in need of supervision and a delinquent. *In re Carter & Spalding*, 20 Md. App. 633, 318 A.2d 269 (Ct. Spec. App. 1974). Elaine Carter did not join in the petition for certiorari to the Maryland Court of Appeals since she had already been returned to the custody of her parents. 273 Md. at 698, 332 A.2d at 250 n.6.

ing pills in her mother's coffee.⁴⁷

At the trial *de novo* the defense counsel moved for the suppression of Cindy Ann's statements on the ground that they were taken in violation of her fifth amendment rights, since the police had failed to warn her properly of her rights in accordance with the requirements of *Miranda v. Arizona*.⁴⁸ A further fifth amendment issue was raised when the defense objected to the state calling Cindy Ann to testify at the trial. The trial judge, however, admitted the statements into evidence and compelled Cindy Ann to testify. At the conclusion of the trial *de novo*, Cindy Ann was adjudicated a CINS and the judge ordered that she be placed in a foster home.⁴⁹

The case was then reviewed by the court of special appeals, which affirmed the decisions of the trial judge. The court initially rejected the contention that *Miranda* required that the confessions be suppressed, concluding that "appellants were not in custody at the time of the statements in question."⁵⁰ Of greater significance, the court then went on to make the broad holding that a juvenile's fifth amendment rights as defined by *Gault* are not applicable to a CINS proceeding.⁵¹ This conclusion was based on the court's belief that the philosophy and implementation of the CINS proceeding sufficiently distinguished it from a delinquency proceeding.⁵²

Although affirming the decision of the court of special appeals, the Maryland Court of Appeals chose to base its decision on the narrow facts presented by the case. The majority reasoned that the United States Supreme Court in *Gault* and *Winship* established a two-pronged test to determine when the procedural rights granted by these decisions apply in juvenile cases. According to the majority opinion, this test requires (1) that a child be charged with having committed an act that would constitute a crime if committed by an adult and (2) that the possibility exists that the child will be confined in a state institution before due process demands application of the protection against self-incrimination.⁵³

The court then applied this test to the facts of the case, concluding that Cindy Ann's acts would not have constituted criminal acts if committed by an adult. As a consequence of this determination, the judges were able to hold that the child was not deprived of her

47. 273 Md. at 693, 332 A.2d at 248.

48. 384 U.S. 436 (1966).

49. 273 Md. at 698, 332 A.2d at 250.

50. 20 Md. App. at 642, 318 A.2d at 275.

51. *Id.* at 654, 318 A.2d at 281.

52. *Id.* at 645-54, 318 A.2d at 276-82.

53. 273 Md. at 704-05, 332 A.2d at 254.

right against self-incrimination since the facts of the case failed to meet the criteria of the first prong of the test.⁵⁴ By treating the case in this manner, the court found it completely unnecessary to consider the second prong of the test in rendering its decision.

The court of appeals took care to point out that its holding did not automatically apply to all children allegedly in need of supervision. Instead it recognized that the United States Supreme Court in *Gault* and *Winship* refused to accept a state's labeling of a juvenile proceeding as either criminal or civil as being determinative of whether or not due process requires the invocation of certain constitutional rights.⁵⁵ The opinion of the court clearly states that the first prong of the test will be complied with if a child is alleged to have committed an act that would have constituted a crime if committed by an adult, regardless of whether the child is charged as being a delinquent or a CINS.⁵⁶ The court reached the conclusion that Cindy Ann's acts were not criminal in nature by categorizing her as a victim of, rather than as a participant in, criminal activity.⁵⁷

This characterization of Cindy Ann as a victim was predicated both upon certain statements and actions of the police, and the disposition of her case in the lower courts. The court of appeals made specific reference to the fact that an investigating police officer testified that he viewed Cindy as a victim. Additionally, the fact that the police immediately sought warrants for the arrest of the adults who allegedly participated in the sex acts with Cindy Ann, charging them with "statutory rape" and "unnatural and perverted sexual practices," was cited as further evidence that the police viewed the Spalding child as a victim of a crime.⁵⁸ The court of appeals simply went on to dismiss as an anomaly the fact that Cindy Ann was initially charged as a delinquent.⁵⁹ To further buttress its conclusion that Cindy Ann Spalding was not a perpetrator

54. *Id.* at 709, 332 A.2d at 257.

55. *Id.* at 703-06, 332 A.2d at 253-54.

56. Whatever else is established by *Gault*, it is clear that labels are not controlling In regard to the first "prong" of the test, for example, it is doubtful that the *Gault* result would have been different had merely the title of the proceedings been changed from "delinquency" to "CINS" The essential element is that the juvenile be charged with an act which would be a crime if committed by an adult.

Id. at 703, 332 A.2d at 253.

57. *Id.* at 708, 332 A.2d at 256.

58. "The testimony describing the circumstances at the hospital and the police station clearly depicts the girls as victims of 'sex' crimes committed by the adults." *Id.*

59. "But, in the context of all the material events, which ensued during the critical period, since she was, in fact, a victim, the charge of 'delinquency' in the petition must be regarded as simply an unexplained anomaly." *Id.*

of criminal acts, the court cited the fact that the master presiding at the adjudicatory hearing, in his memorandum adjudicating her a CINS, described Cindy Ann as having been victimized by a group of adults.⁶⁰

Judge Eldridge disagreed with the majority's conclusion that Cindy Ann did not commit acts which would be criminal if committed by an adult.⁶¹ Although agreeing with the majority that the Supreme Court cases establish a two-pronged test for determining when fifth amendment rights apply to juvenile cases,⁶² he was unable to concur with the majority's application of that test to the facts in *Spalding*.

Rather, he charged that when the majority characterized Cindy Ann as a victim of crime, thereby negating the application of her fifth amendment rights, it failed to heed its own admonition that labels are not controlling.⁶³ Judge Eldridge based his contention on the premise that the facts which established the basis for Cindy Ann's adjudication as a CINS constituted acts which would have been crimes if committed by an adult.⁶⁴ The judge, quoting from the initial petition and the opinions of the masters and the trial judge, demonstrated that from the filing of the petition through the *de novo* hearing, the underlying invocation of the juvenile court system was predicated upon Cindy Ann's alleged commission of unnatural and perverted sex acts and her consumption of controlled and prohibited drugs.⁶⁵ He then concluded that when ap-

60. *Id.* The memorandum to which the court referred stated, in part:

Police investigation indicates that these young girls had been victimized by a group of adults in the Dundalk area and elsewhere, for purposes of sexual abuse and drug experimentation. It is not known at this point just how much damage has already been done, physically and psychologically, to these girls.

Id. at 694, 332 A.2d at 248-49.

61. *Id.* at 710, 332 A.2d at 257 (Eldridge, J., dissenting).

62. "The majority opinion, in my view, correctly construes *Gault* and the subsequent Supreme Court cases, as setting forth a two-pronged test for determining whether the Fifth Amendment privilege against self-incrimination is applicable to a juvenile proceeding." *Id.*

63. *Id.*

64. *Id.* at 710-14, 332 A.2d at 257-59.

65. In the petition to the juvenile court, filed February 1, 1973, Cindy Ann Spalding was charged with being a delinquent child and a child in need of supervision. The only specific facts alleged in the petition as a basis for the charges were that "respondent has consumed controlled and prohibited narcotics and engaged in acts of sexual intercourse and sexual perversion with an unknown number of male and female adults for a period of more than one year." . . .

The juvenile court master, Mr. Kahl, on February 1, 1973, signed a "Commitment Order," which recited that Cindy Ann Spalding has been adjudged a child in need of supervision, and which committed her to the custody of the Department of Juvenile Services. . . . Other than a reference to the fact that the girls needed medical treat-

plying the rights afforded juveniles by *Gault* and the subsequent Supreme Court decisions in a CINS proceeding, it is necessary to examine the underlying factual allegations to determine if a child has committed acts which would be criminal if committed by an adult.⁶⁶ Applying this standard to the facts of *Spalding*, Judge Eldridge determined that Cindy Ann's alleged acts would have been violations of the Maryland Criminal Code if she had not been a minor.⁶⁷ After thus deciding that the first prong of the test had been met, the dissent then examined the applicable Maryland law and similarly concluded that the second prong of the test, *i.e.*, the loss of liberty, had also been satisfied.⁶⁸ Since both requirements of the majority's test had been fulfilled, Judge Eldridge concluded that Cindy Ann Spalding was denied her fifth amendment rights when her confession was admitted into evidence and she was compelled to testify against herself at the trial.⁶⁹

A survey of reported state court decisions which attempt to decide when the *Gault* line of cases must be applied in juvenile adjudicatory proceedings produces three conclusions: (1) the authority is suprisingly scant, (2) the available authority is inconsistent, and (3) the majority of state courts have concluded that invocation of procedural due process rights in a juvenile adjudicatory proceeding is mandated only when the juvenile is charged with an act which would be a crime if committed by an adult and, if the charge is proved, faces potential incarceration. These courts have thus adopted a strict two-pronged test for the invocation of these rights. The remainder of this article will be devoted to analyzing the state court cases and developing an alternative to the two-pronged test as applied in the majority of state courts.

ment, the sexual conduct and drug abuse constituted the only facts or basis set forth in the memorandum for the commitment order. . . . The trial judge, in his opinion he delivered at the end of the trial adjudicating petitioner and her co-defendant to be "children in need of supervision," found as a fact that the girls "have been associated in immoral sexual activities" and have "indulged" in the taking of "drugs of a narcotic nature."

Id. at 711-12, 332 A.2d at 258.

66. [A]s this case illustrates, criminal conduct may furnish the factual basis for the "CINS" adjudication. For example, "CINS" includes children who are "habitually disobedient, ungovernable, and beyond [their parents'] control." . . . The evidence of such characteristics, as in this case, may be criminal acts. "CINS" also includes a child who "[d]eports himself so as to injure or endanger himself or others." . . . Of course, a child who commits criminal acts such as using narcotic drugs or "drugging" someone else, is deporting herself "so as to injure or endanger" herself or others.

Id. at 713, 332 A.2d at 259.

67. *Id.* at 712, 332 A.2d at 258.

68. *Id.*

69. *Id.* at 713-14, 332 A.2d at 259.

IV. ANALYSIS OF STATE COURT DECISIONS

An analysis of the limited extension of due process rights by state courts applying the *Gault* line of cases must be made on two levels. First, if it is assumed that the courts employing a strict two-pronged test are correct, it must be determined how this test should be applied. The importance of this inquiry is brought to the forefront by the intriguing reasoning the Maryland Court of Appeals used to conclude that the juvenile in *Spalding* did not commit an act which would constitute a crime if committed by an adult. Second, an additional consideration must be made: Is the minority view that the two-pronged test is overly restrictive correct and if so, what test should be substituted?

A. Analysis of the Determination That a Juvenile's Acts Would Constitute a "Crime if Committed by an Adult"

It would appear that Judge Eldridge took the correct approach in applying the two-pronged test to the facts of *Spalding*. As he pointed out,⁷⁰ the alleged acts would have constituted crimes if committed by an adult. The Maryland Criminal Code provides that any man or woman who performs any unnatural sex act is subject to a fine not to exceed \$1,000 or imprisonment not to exceed ten years.⁷¹ Similarly, a person who uses or possesses any controlled dangerous substance is subject to a potential imprisonment of four years.⁷² In light of Maryland law, it is almost impossible to comprehend how the majority reached its conclusion that a child, who allegedly engaged in unnatural sex acts with adult women and consumed narcotic drugs, did not commit acts of a criminal nature.

It is difficult to argue with the conclusion of the masters and judges that the facts in *Spalding* present a rather clear picture of a thirteen year old child being abused and victimized by a group of adults. However, the real issue is whether a child's status as a victim of adult criminal activity is a sufficient legal standard upon which to deprive him or her of constitutional safeguards.

The first problem in utilizing such a standard is determining the outer limits of the test. Judge Eldridge suggests that the majority's logic would allow the characterization of a juvenile as a victim whenever he or she was being controlled by adults. He suggests that a child engaging in an armed robbery in collusion with adults can be viewed as a victim and, if charged as a CINS, can be so adjudicated without ever having the benefit of the right against

70. *Id.* at 712, 332 A.2d at 258.

71. MD. CRIM. LAW CODE ANN. § 554 (Supp. 1977).

72. *Id.* § 287(d)-(e) (1976).

self-incrimination.⁷³ It is doubtful the majority would extend the holding of *Spalding* to this situation, but Judge Eldridge's hypothesis demonstrates the fragile nature of the *Spalding* test.

On the other hand, it could be argued that a child's status as a victim under *Spalding* must be limited to situations in which the child is being used by an adult in the perpetration of a so-called victimless crime. The apparent merit of this approach dissipates, however, when it is applied to the fact that Cindy Ann was charged with consuming prohibited drugs. The Maryland Criminal Code states that the purpose of the drug laws is "to prevent [drug] abuse which results in a serious health problem to the individual and represents a serious danger to the welfare of the people."⁷⁴ Thus, it would be difficult to conclude that the Maryland Legislature intended to categorize the consumption of prohibited drugs as a victimless crime. If the application of the protection against self-incrimination to a child charged with being in need of supervision depends, in part, on whether the facts of the case render the child a victim, future litigation is necessary to define effectively the term "victim."

Further, the majority's victim participant dichotomy does not give a clear guideline to law enforcement agencies and might even encourage official misconduct. Officers investigating alleged juvenile offenses in Maryland, when determining whether or not they should give *Miranda* warnings to a suspect, may now also take into consideration whether a child might be categorized a victim. Therefore, in a given case, officers burdened with the many problems of effectuating an adequate waiver from a juvenile⁷⁵ may convince themselves that the child is a victim according to *Spalding* and dispense with the *Miranda* warnings. An officer's

73. The majority opinion in this case could have significant consequences. Because Cindy Ann Spalding is labelled a "victim," and because the proceedings are called "CINS" instead of "delinquent," she is deemed not entitled to those constitutional rights which the Supreme Court has held are applicable in juvenile proceedings. However, if petitioner was a "victim," anytime a juvenile is engaged in criminal activity with adults, the juvenile could be said to be a "victim." A teenager might be enticed by an adult into engaging in a series of armed robberies with the adult, and could be viewed as a "victim."

273 Md. at 716, 332 A.2d at 260.

74. MD. CRIM. LAW CODE ANN. § 276(a) (1976).

75. For a discussion of the problems of obtaining a valid waiver of fifth amendment rights by a juvenile, see Comment, *Constitutional Law—Miranda Warnings to Juveniles in New Jersey: The Worst of Both Worlds Revisited*, 26 RUTGERS L. REV. 358 (1973); Note, *The Admissibility of Juvenile Confessions: Is an Intelligent and Knowing Waiver of Constitutional Rights Possible Without Adult Guidance?*, 34 U. PITT. L. REV. 321 (1972).

misapplication of this rather unclear standard may result in the suppression of vital evidence.

Potential abuse in the application of the *Spalding* decision is presented by the facts of the case. It must be remembered that Cindy Ann was originally charged with being both a delinquent and a CINS.⁷⁶ As was previously demonstrated, she allegedly committed acts which would be criminal if committed by adults.⁷⁷ Consequently, it would appear that the original delinquency charge was correctly initiated. However, these same factual allegations also provided the basis for her being declared ungovernable or a danger to herself, thus rendering her a CINS.⁷⁸ Therefore, in a case in which the investigating officers fail to provide a juvenile with fifth amendment protections, the prosecuting attorney would have the option of correcting the officer's misconduct by arguing at the adjudicatory hearing that the child was a victim and under *Spalding* may be adjudicated a CINS, without regard to the constitutional protection against self-incrimination.

Despite the inevitable problems created by its *Spalding* opinion, the court quite properly refused to follow the Maryland Court of Special Appeals in allowing legislative labels to determine when constitutional rights apply in juvenile adjudicatory proceedings. This important decision was made when the court determined that it was necessary to inquire whether the underlying act charged would constitute a crime if committed by an adult rather than simply to conclude that the *Gault* line of cases do not apply in CINS proceedings.⁷⁹ Consequently, the Maryland Court of Appeals re-

76. See text accompanying note 45 *supra*.

77. See text accompanying notes 65 & 71-72 *supra*.

78. See text accompanying note 65 *supra*.

79. See text accompanying note 56 *supra*. Compare *In re Wheeler*, 229 N.W.2d 241 (Iowa 1975), in which the Supreme Court of Iowa acknowledged that an important question is whether courts should rely on the formal charge or look to the underlying facts when determining which constitutional safeguards must be applied in juvenile adjudicatory proceedings. However, the court determined that resolution of this fundamental question was unnecessary to a decision in that case.

In *Wheeler*, a 15 year old was charged with delinquency for (1) breaking and entering with intent to commit a public offense and (2) habitually deporting himself in a manner injurious to himself or others by breaking and entering and committing lascivious acts with a minor. *Id.* at 241. The applicable Iowa code provided, *inter alia*, that "[t]he court's finding . . . [of] delinquency shall be based upon clear and convincing evidence under the rules applicable to the trial of civil cases" *Id.*

It was argued on behalf of the juvenile that "when a finding of delinquency is grounded upon commission of an act which would constitute a crime if committed by an adult it is constitutionally impermissible to apply the 'clear and convincing' standard of proof rather than the requirement of proof beyond a reasonable doubt." *Id.* The court concluded that the evidence proved

quired consideration of the underlying basis for the charge regardless of whether the juvenile was officially charged with being delinquent or a CINS. This means that even if a juvenile is officially charged with what is generically referred to as a status offense, the inquiry still must be made as to whether the actual acts which must be proved to adjudicate the juvenile guilty would constitute a crime if committed by an adult. It must be remembered that the Maryland Court of Appeals believed that the *Gault* and *Winship* decisions mandated this approach.⁸⁰

In *Gault*, the Supreme Court was presented with the argument that the protection against self-incrimination does not apply in juvenile cases because of the civil nature of a juvenile proceeding. This argument was premised on the fact that the fifth amendment statement of that protection refers only to criminal proceedings.⁸¹ This position was clearly rejected by the Court when it stated:

It would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these cannot lead to "criminal" involvement. In the first place, juvenile proceedings to determine "delinquency," which may lead to commitment to a state institution, must be regarded as "criminal" for purposes of the privilege against self-incrimination. To hold otherwise would be to disregard substance because of the feeble enticement of the "civil" label-of-convenience which has been attached to juvenile proceedings.⁸²

Three years later in *Winship* the Supreme Court again rejected the argument that constitutional safeguards can be withheld in a juvenile proceeding on the basis that such a proceeding is not criminal in nature and is not intended to punish the offender.⁸³

beyond a reasonable doubt that breaking and entering had been committed. More importantly, it was also contended that the juvenile court had applied an unconstitutional standard of proof with respect to the "habitual deportment" charge. It was argued that "the allegation of lascivious acts charged a crime (required to be proved beyond a reasonable doubt) despite being subsumed under the 'habitual deportment' allegation." *Id.* at 243. Unfortunately, the court never resolved these issues finding that the only ground for delinquency was breaking and entering.

80. 273 Md. at 703, 332 A.2d at 253. See text accompanying note 56 *supra*.

81. "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

82. *In re Gault*, 387 U.S. at 49-50.

83. In the course of its opinion in *Winship*, the Court stated:

In effect the Court of Appeals distinguished the proceedings in question here from a criminal prosecution by use of what *Gault* called the "civil" label-of-convenience which has been attached to juvenile proceedings. . . . But *Gault* expressly rejected that distinction as a reason for holding the Due Process Clause inapplicable to a juvenile proceeding. . . . The Court of Appeals also attempted to justify the preponderance standard on the related ground that juvenile proceedings are designed "not to punish, but to save the child." . . . Again, however, *Gault* expressly rejected this justification. . . . We made clear in that decision that civil labels and good intentions do not

In *Breed v. Jones*⁸⁴ the Supreme Court, citing *Gault* and *Winship*, again clearly stated that the invocation of constitutional rights in juvenile adjudicatory proceedings must not be dependent upon shorthand labels. The Court stated: "For it is clear under our cases that determining the relevance of constitutional policies, like determining the applicability of constitutional rights, in juvenile proceedings, requires that courts eschew 'the "civil" label-of-convenience which has been attached to juvenile proceedings.'"⁸⁵ In light of the admonition in *Gault*, *Winship* and *Jones* that mere labels do not determine whether a juvenile must be afforded procedural due process protections during juvenile adjudicatory proceedings, it would appear that the recent trend to re-classify juvenile offenses should not affect the application of those rights. Therefore, if the application of those rights is predicated upon the juvenile's being charged with committing an act which would constitute a crime if committed by an adult, the court must look to the underlying factual basis of the charge.

B. An Alternative to the Two-Pronged Test

State courts recognize that the procedural safeguards defined by *Gault*, *Winship*, and *Jones* attach during the adjudicatory proceedings when a juvenile is charged with an act which would constitute a crime if committed by an adult, and if proved, face potential incarceration. Until the Supreme Court reviews a case arising under facts which clearly present the issue of whether the *Gault* line of cases applies when either or both of the elements of the two-pronged test is not present, one can only speculate as to whether the constitutional protections defined by the Court would extend to such a child. The scant authority found in state courts falls far short of being any indication of how the Supreme Court will decide the issue. The development of an alternative test mandates consideration of the purpose of creating a separate juvenile court system.

For more than three-quarters of a century, American jurisprudence has been struggling to establish a specialized procedure to

themselves obviate the need for criminal due process safeguards in juvenile courts, for "[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."

397 U.S. at 356-66 (citing and quoting 387 U.S. at 27, 50-51; 24 N.Y.2d at 197, 247 N.E.2d at 254).

84. 421 U.S. 519 (1975).

85. *Id.* at 529 (quoting 387 U.S. at 50).

deal with the unique problems of juveniles.⁸⁶ It is not disputed that this endeavor has afforded certain benefits to juvenile offenders. If the juvenile system is examined as a whole, however, it must also be recognized that children are put in a rather special category.⁸⁷ The consequence of the creation of this special category is that the juvenile laws place duties upon children which do not extend to adults, the breach of which may bring them before the judicial system. For example, under most state laws, a child may be adjudged delinquent or in need of supervision for status offenses like truancy, and as a result, may be separated from home, placed in a foster or group home, or even institutionalized.⁸⁸ Thus, if satisfaction of the two-pronged test is necessary before a juvenile is afforded procedural due process rights in a juvenile adjudicatory proceeding, a juvenile charged with truancy would not be afforded these protections even if he or she faces incarceration in a state institution. This denial of rights would result from the fact that truancy, by definition, cannot be an adult crime. Consequently, the first prong of the test would not be met. This result could be altered under the application of the two-pronged test only if a court inquired into the underlying cause of the truancy and found that the juvenile's absence from school was the result of the commission of acts which would constitute a crime if committed by an adult. The application of the two-pronged test in a truancy case results from a failure to recognize that children, by virtue of their age, have a duty placed upon them by state law, the breach of which could result in a loss of liberty.

Therefore, it must be recognized that when juveniles charged with truancy are brought before juvenile courts, those juveniles, because of the special duty the law places on them, are in the same position as adults charged with the commission of penal offenses. In view of this similarity between the juvenile and criminal court systems,⁸⁹ it defies logic to deny the juvenile due process protections which would be afforded an adult defendant simply because an adult cannot be charged with committing an offense which was specially designed to govern juveniles.

86. The first juvenile court system in the United States was established in Illinois in 1899 by the Law of April 21, 1899 Ill. Laws 131.

87. For a discussion of the unique legal position in which the juvenile court system places adolescents, see Forer, *Rights of Children: The Legal Vacuum*, 55 A.B.A.J. 1151 (1969).

88. It has been estimated that over two-thirds of the states have specifically enumerated truancy as a basis for juvenile court jurisdiction over children. Rosenberg & Rosenberg, *Truancy, School Phobia and Minimal Brain Dysfunction*, 61 MINN. L. REV. 543, 544 n.5 (1977). See also notes 1-4 & accompanying text *supra*.

89. This characterization is limited to proceedings to determine whether a juvenile is a PINS, CINS, or a delinquent.

Most reported state court decisions which have refused to extend the *Gault* line of cases beyond their facts have done so on the basis that the first prong of the test, an act which if committed by an adult would be a crime, was not present. However, at least one appellate court decision refused to afford these due process protections to a juvenile charged with commission of criminal acts solely because that juvenile did not face incarceration.⁹⁰ Thus, authority exists that if either element of the two-pronged test is not present in a juvenile adjudicatory proceeding, procedural due process rights will not attach.⁹¹ Unfortunately, the incarceration element has been used as a talisman to answer the question of what rights should be afforded a juvenile rather than as a vehicle for analysis. Although the first element of the two-pronged test is an inadequate criterion upon which to determine the application of procedural due process rights in juvenile adjudicatory proceedings, the incarceration element of the test is an appropriate and viable point of focus.

It is clear that the juveniles in *Gault*, *Winship*, and *Jones* faced potential incarceration in a state institution. It would be possible, therefore, to state that these Supreme Court cases set forth the proposition that the protections defined therein are to be implemented only when the juvenile is faced with the possibility of institutional confinement. Despite the fact that Justice Fortas' majority opinion refers to the prison-like atmosphere which pervades juvenile detention and training centers,⁹² it would be an over-simplification to state that the opinion foreclosed the possibility of applying these rights in a juvenile adjudicatory proceeding which might result in a deprivation of liberty less restrictive than commitment to a training center. In his review of the juvenile court system, Justice Fortas acknowledged that a basic premise of the system is that a juvenile has a right to custody but not to liberty. Therefore, in appropriate circumstances, under the doctrine of *parens patriae*, the state has the right to intervene and take custody of the juvenile. This theory allows the designation of a juve-

90. *In re K.*, 26 Or. App. 451, 554 P.2d 180 (1976). See text accompanying notes 33-34 *supra*.

91. See also note 32 *supra*.

92. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes "a building with whitewashed walls, regimented routine and institutional hours" Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide.

387 U.S. at 27.

nile proceeding to be civil rather than criminal and nullifies the need to extend the procedural safeguards of the criminal justice system to the juvenile courts.⁹³ The Court then observed that despite high ideals and motivations, a juvenile procedure was established "unknown to our law in any comparable context. The constitutional and theoretical basis for this peculiar system is—to say the least—debatable."⁹⁴

In view of the doubt cast upon the theoretical basis for the creation of the juvenile court system and the frequent references to loss of liberty in the *Gault* opinion,⁹⁵ it would be appropriate for courts applying that decision to approach the question of whether constitutional rights attach in terms of the potential loss of liberty facing the juvenile. Specifically, the question must be answered whether potential placement in a foster or group home would constitute a substantial enough threat to liberty so as to necessitate the invocation of procedural due process protections. Unfortunately, state courts have not addressed this issue. If the courts do decide to analyze this issue they should realize that placement in a foster or group home is one of the characteristics unique to the juvenile court system. It would be unfortunate if courts reason that because these alternative forms of commitment are less abhorrent than placement in a training center, it automatically follows that use of these alternatives does not constitute a deprivation of liberty. It would be appropriate to inquire into whether the removal of a juvenile from the family situation constitutes a deprivation of the right of liberty. If this question is answered in the affirmative, the groundwork is laid for an appropriate test to determine whether procedural due process rights must be applied in a juvenile adjudicatory proceeding. Simply stated, if a juvenile faces a potential loss of liberty for allegedly breaching a duty imposed on the juvenile by law as a result of his or her status as a juvenile, or for commission of acts which would constitute a crime if committed by an adult, procedural due process safeguards must be afforded the juvenile during the adjudicatory proceeding. The practical effect of utilizing this test would be that in most cases, juveniles who are charged as delinquents, PINS, or CINS and face a deprivation of liberty by virtue of potential placement in a foster or group home or training center will be entitled to all the protections flowing from the *Gault* line of cases. Admittedly, this goes beyond the Supreme Court decisions.

It is impossible to predict if the Supreme Court will extend the *Gault*, *Winship* and *Jones* due process safeguards to cases in

93. *Id.* at 16-17.

94. *Id.* at 17.

95. *Id.* at 13, 27, 29, 31 n.48, 34, 36-37, 41, 50, 56 & 57.

which the juvenile is charged with a status offense and faces potential placement in a foster home. However, it must be noted that in *Jones*, the most recent of the *Gault* line of cases, a unanimous Court expressed the view that the juvenile court system, as actually applied, has not been able to attain its initial goals.⁹⁶ Perhaps this acknowledgement by the Supreme Court may indicate the eventual expansion of constitutional rights in juvenile proceedings.

V. CONCLUSION

Since the Supreme Court's decision in *In re Gault* there have been surprisingly few recorded state court decisions addressing the fundamental question as to when the *Gault* line of protections must be afforded a juvenile. A majority of these cases have decided that a juvenile is not entitled to the *Gault* protections unless he or she is charged with having committed an act which would not only constitute a crime if committed by an adult but would also result in possible incarceration.

This two-pronged test, which is not mandated by the Supreme Court of the United States, fails for two reasons. First, it does not take into consideration the special behavioral standards imposed upon juveniles by state law solely because of their age and second, it focuses only on the more extreme forms of deprivation of liberty such as state institutions rather than foster care.

The two-pronged test should be abandoned in favor of a principle that whenever a juvenile faces a potential loss of liberty for having allegedly breached a duty imposed on the juvenile by law as a result of his or her status as a juvenile, or for commission of acts which would constitute a crime if committed by an adult, the *Gault* protections must be afforded the juvenile.

96. Although the juvenile-court system had its genesis in the desire to provide a distinctive procedure and setting to deal with the problems of youth, including those manifested by antisocial conduct, our decisions in recent years have recognized that there is a gap between the originally benign conception of the system and its realities. With the exception of *McKeiver v. Pennsylvania*, . . . the Court's response to that perception has been to make applicable in juvenile proceedings constitutional guarantees associated with traditional criminal prosecutions. . . . In so doing the Court has evinced awareness of the threat which such a process represents to the efforts of the juvenile-court system, functioning in a unique manner, to ameliorate the harshness of criminal justice when applied to youthful offenders. That the system has fallen short of the high expectations of its sponsors in no way detracts from the broad social benefits sought or from those benefits that can survive constitutional scrutiny.

421 U.S. at 529.